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89 No 2191

In The

Supreme Court of the United States

October Term, 1989

CYNTHIA M. COLVERT
(now Gilbert),

Petitioner,

versus

JAMES ROBERT COLVERT, Jr.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTIONS PRESENTED FOR REVIEW

1. In the actual trial on the substantive merits of a civil case involving fundamental rights, does the trial judge's reception, *in camera*, and in the involuntary, judicially-imposed absence of the litigants *and even of their counsel*, of the unsworn and secret testimony of a witness, followed by the judge's sealing the *in camera* transcript so as to deny the litigants knowledge of even the substance of the unsworn secret testimony, violate procedural Due Process of Law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Phrased more precisely in the context of this case, **Does the practice of a trial judge, in presiding over a judicial child-custody contest between two divorced parents, of entertaining *in camera*, secretly, and not under oath, the testimony of the minor child himself, and thereafter withholding from the parents even so much as a summary of the substance of the child's testimony, violate the parent-litigants' right to Due Process of Law?**

3. In more particular, does this "*in camera* interview" practice, whether in a custody contest or in any other type of a civil case's *actual trial on the merits*, violate the litigants' Due Process rights to:

   a. A open and public trial?

   b. Confrontation and cross-examination of the testifying child?

QUESTIONS PRESENTED FOR REVIEW – Continued

c. Rebuttal of the child's testimony by the parents' own independent testimony and evidence?

4. Does the essential substance of the specific procedural guarantees of the Bill of Rights apply to civil proceedings in the State courts by virtue of the Due Process guarantee of the Fourteenth Amendment?

5. Are the Due Process violations mentioned above rendered "harmless" because of the existence of "other evidence" assertedly consistent with the trial judge's decision in such a trial?

6. Is the "best interests of the child" test, either on its face or as applied to the facts of this case, violative of Due Process by reason of vagueness and overbreadth?

7. Should the instant case be reviewed as the civil "companion-case" analogue to the pending criminal child-witness "shield" cases of *Maryland v. Craig*, U.S., October Term No. 89-478, and *Idaho v. Wright*, U.S., October Term, 1989, No. 89-260, certiorari granted in both cases on January 16, 1990?

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No. _____

In The

Supreme Court of the United States

October Term, 1989

CYNTHIA M. COLVERT
(now Gilbert),

Petitioner,

versus

JAMES ROBERT COLVERT, Jr.,

Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

COMES NOW Petitioner, CYNTHIA M. COLVERT, now Gilbert ("Mrs. Gilbert," "Cindy"), and for her instant Petition for a Writ of Certiorari respectfully alleges and avers as follows:

[1] The Caption lists all Parties to this instant action, both in this Court and in the lower courts. The Attorney General of Oklahoma is also being served under 28 U.S.C. 2403(a) because of the possible involvement of 12 O.S., 1986 Supp., Sec. 1277.1 (renumbered in 1989 to 43 O.S.A. 113) in this matter.

THE DECISIONS BELOW

The action below was on a motion filed in April of 1986 by the Respondent, James R. Colvert, Jr. ("Dr. Colvert," "Jim"), to modify the Parties' decree of divorce entered in 1976 by the District Court of Oklahoma County, Oklahoma, in Case No. JFD-75-1675, *James R. Colvert, Jr., vs. Cynthia M. Colvert*, later affirmed in *Colvert v. Colvert* (Okla., 1977) 568 P.2d 623, whereby the Parties' minor child, James Robert Colvert, III ("Jay"), then three, was placed in the custody of his mother, the Petitioner herein. [That original divorce and custody decision, and subsequent affirmance, is not challenged by the instant Petition.] The Respondent's said 1986 Motion to Modify [Custody] sought to transfer custody of the child from the Petitioner mother (Mrs. Gilbert) to himself.

That Motion to Modify was granted by the District Court of Oklahoma County on September 17, 1986, and is the subject of the instant Petition. The District Court's Oral Pronouncement of Judgment is reproduced at Appendix A hereto, and the Journal Entry thereof, filed on April 9, 1987, is reproduced hereto at Appendix B.[2]

The intermediate Court of Appeals of the State of Oklahoma, Division III, affirmed in the unreported *Colvert v. Colvert*, Appeal No. 67,525, on January 24, 1989, Appendix C hereto. A timely Petition for Rehearing filed by the Petitioner on February 13, 1989, was denied by the Court of Appeals on March 9, 1989, Appendix D. The Supreme Court of the State of Oklahoma denied review on November 1, 1989, Appendix E. Under Oklahoma

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[2] Under Oklahoma practice, the oral pronouncement is deemed to be "the" judgment, while the formal journal entry is but a "record" thereof. *Warehouse Market, Inc. v. Berry* (Okla., 1969) 459 P.2d 853.

practice, further petitions for rehearing or reconsideration are not allowed.[3] This instant Petition is taken from that denial of review.

JURISDICTION TO ENTERTAIN THIS PETITION

As noted above, the Oklahoma Supreme Court denied Mrs. Gilbert's petition for State certiorari on November 1, 1989, which denial exhausted the Petitioner's State-court remedies (see footnote 3, supra).

Therefore, jurisdiction to review the constitutional aspects of this matter is conferred upon the Supreme Court of the United States by 28 U.S.C. 1257(a), 28 U.S.C. 2101(c), and U.S. Supreme Court Rule No. 20.2.

LEGAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in relevant part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment to the United States Constitution states, in relevant part, that:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Section 1277.1 to Title 12 of the Oklahoma Statutes, 1986 Supp. (now renumbered as 43 O.S.A. 113), states, in relevant part, that:

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[3] Oklahoma Appellate Rule 3.17, 12 O.S.A., Ch. 15, App. 3.

§ 1277.1. Preference of Child.

In any action for divorce, legal separation, or annulment in which a court must determine custody . . . the child may express a preference as to which of its parents the child wishes to have custody . . .

If the child expresses a preference or gives testimony, such preference or testimony may be taken by the court in chambers, with or without the parents or other parties present, at the court's discretion. If attorneys are not allowed to be present, the court shall state, for the record, the reasons for their exclusion. At the request of either party, a record shall be made of any such proceeding in chambers.[4]

STATEMENT OF MATERIAL FACTS

A. The Procedural Due Process Issues

The Parties hereto married each other during their undergraduate days at the University of Oklahoma. Jim Colvert was later admitted to the O.U. Medical School, at

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[4] Petitioner will candidly disclose that there may be some question over how "directly" this statute is involved herein. The *"in camera"* portions of 12 O.S., 1986 Supp., Sec. 1277.1 were added by the 1986 Legislature, see Oklahoma Session Laws, 1986, Ch. 196, p. 591. That amendment was enacted on May 29, 1986, but carried an effective implementation date of November 1, 1986 – whereas the trial in this case took place on September 15-17 of 1986. However, as is evident from the State affirmance herein, Paragraphs 5-6, Appendix C, App., pp. 14-15, the Oklahoma Court of Appeals appears to have relied on the "rationale" of this Statute in rejecting the Due Process contentions advanced herein.

Because of the uncertainty over Section 1277.1's involvement herein, the Petitioner is serving notice of this action also upon the Attorney General of Oklahoma pursuant to 28 U.S.C. 2403(a).

which time his then wife, Cindy, went to work to put him through his medical training. One year before Jim was to graduate, he filed for divorce, which was eventually granted to Cindy, who also got custody of the Parties' then-infant son, Jay, the subject of the present dispute. For further background, see *Colvert v. Colvert* (Okla., 1976) 568 P.2d 623.

After that divorce, the Petitioner mother left Oklahoma City and returned to her native Tulsa, where, as a single, working mother she commenced to bring up Jay by herself. In 1983, she married one Fred Gilbert, a patent attorney practicing in Tulsa, thereby giving Jay a stepfather, and at which time Cindy quit work to become, for the first time, a full-time mother for her child. [The Gilberts have since had two children, born in 1985 and in 1987.]

By all accounts and evidence developed at the custody (or more properly, at the "modification") trial held in September of 1986, the Petitioner mother had done an outstanding job of parenting Jay, as admitted by the Respondent father's own forensic psychologist, Trial Transcript ("Tr."), p. 146, who also admitted that the boy was virtually a model child, Tr., 139-145. In fact, even the Respondent father conceded that the Petitioner mother had done an exemplary job of raising Jay, Tr., 66.

Nevertheless, the Respondent father filed his motion to modify custody decree on April 14, 1986, and won that modification action at the trial conducted on September 15-17, 1986. As might be expected from the evidence summarized in the preceding paragraph, the Respondent father's case for seizing the child was not the strongest. In essence, he had only one argument for modification, namely, that he had succeeded in prevailing upon the child to voice a preference for moving over to his father's household. That, of course, was not enough under

Oklahoma law,[5] and especially not on modification (as opposed to initial award) of custody.[6] Moreover, the only justification or basis for the child's expressed preference was, at least as far as the *open-court* testimony went, little more than his juvenile perception of more "fun" to be had in his father's household, Tr., 41-43, 50, 64-65, 100, 125, 178, 250-251, 328-329. Related to this consideration was also, perhaps, the fact that the Petitioner mother, while very loving of her child, had (*for that very reason!*) also been reasonably firm with him throughout his childhood, never shrinking from applying necessary discipline on an "as needed" basis, Tr., 189, 240-242, whereas Dr. Colvert, on the other hand, had apparently never disciplined his son, Tr., 52.

Under these essentially undisputed facts and the applicable Oklahoma case-law, the Respondent father's motion to modify should have been soundly denied.

But then, the "very integrity of the fact-finding process"[7] got compromised: the trial judge decided, on his own motion, to interview a central witness secretly in chambers. Naturally, the Petitioner mother's attorneys vigorously objected, but His Honor summarily overruled those objections, and declared that conventional procedures would not apply because, as the Honorable United States Justices have undoubtedly perceived by now, it was the child himself whom the trial court was calling as a witness, and the trial court felt that adherence to conventional procedure might possibly tend to make

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[5] See *Davis v. Davis* (Okla., 1960) 355 P.2d 572, 574, *Kennedy v. Kennedy* (Okla., 1969) 461 P.2d 614, 615, and *Duncan v. Duncan* (Okla., 1969) 449 P.2d 267, 269.

[6] See *Gibbons v. Gibbons* (Okla., 1968) 442 P.2d 482, and *Boatsman v. Boatsman* (Okla., 1985) 697 P.2d 516.

[7] See *Berger v. California* (1969) 393 U.S. 314, 315, and related cases, discussed at p. 25, below.

the child feel "ill at ease," which, in His Honor's evident view, simply overrode all other considerations. Tr., 215-217.

His Honor's "ill at ease" sentiments, however, were neither evidentiary nor individualized in the sense of being based on any such assertion by the child himself (the trial judge had not even seen Jay as yet), or by the testimony of any of Jay's parents or stepparents, or by any psychological or other expert or witness. Instead, the trial court's "ill at ease" justification for cloaking the child's testimony behind the veil of *in camera* secrecy was merely an assumption to that effect. Tr., 216.

This exchange between the trial judge and counsel, therefore, raised the open-trial and confrontation/cross-examination Due Process issues presented by the instant Petition.

Counsel's right to cross-examination, after being thus denied, was instead "simulated" by the trial court's allowing counsel for both sides to write down specific factual questions to be submitted to the court for His Honor's in camera propounding to the child – questions which went to several pages of "interrogatories." It is therefore evident from this mode of indirect "cross-examination," as well as from the transcript of the child's own testimony,[8] that the *in camera* "interview" between the trial judge and the child went far beyond the child's naked expression of a preference (which was not even in dispute), and actually delved rather deeply into the child's supposed "factual" bases for his expressed preference.

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[8] Unsealed a year later by the State Supreme Court. Order of September 16, 1987, Appendix F hereto.

And, to compound this secret-testimony problem even further, His Honor, after emerging from his hour-long *in camera* interrogation of the child, then *immediately* announced his decision to transfer custody – without even so much as summarizing the substance of the child's secret testimony, and thereby without giving the parent litigants any opportunity whatsoever to explain or rebut, even by evidence independent of the child, whatever adverse it was that the child had testified to *in camera*. Indeed, far from even summarizing the child's testimony, the trial court instead went so far, again on its own motion, as to order the transcript of the child's testimony sealed (so as to preclude appellate review of His Honor's decision?).[9] Thus, this right-of-rebuttal component of Due Process herein was not violated, and therefore did not arise, until the very conclusion of the trial, and wherefor the Petitioner's only effective remedy was to appeal.

[As noted in footnote 8, supra, it was not until a year after the trial had concluded that this Petitioner finally learned, pursuant to the Oklahoma Supreme Court's order to unseal the transcript, what her child had testified to. For openers, the Petitioner mother only then learned that His Honor had not bothered to place the child under oath. More disturbing, of course, was reading what utter

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[9] In his Oral Pronouncement of Judgment of September 17, 1986 (App. A, p. 2) and in the formal Journal Entry of Judgment (App. B., p. 7), His Honor had stated that he would unseal the transcript if an appeal should be taken. On November 13, 1986, however, His Honor reneged on that assurance: he instead declared that *no one* (not even counsel!) was going to "get away with" an appeal as a "pretext" for "snooping" into the sealed transcript. Transcript of November 13, 1986, pp. 14-20. Therefore, the Petitioner's principal brief on appeal was necessarily delayed by the year which it took the Oklahoma Supreme Court to order interlocutorily the unsealing of the transcript, see footnote 8, supra.

"factual" nonsense the Petitioner's child had actually testified to. However, only one such glaring "factual" misassertion by the child will (or need) be mentioned in this Petition – the utterly astounding "coached" testimony that: there was actually more discipline in the child's father's house; that he (Jay) knew that his mother was too lenient with him; and that he realized that he truly needed his father's firmer hand(!); Transcript of Jay's Testimony, pp. 35, 37. And that secret testimony was clearly prejudicial: in a subsequent proceeding, Judge Croy expressly stated that it was *that* [secret!] testimony as much as anything which caused him to sustain Dr. Colvert's motion to modify custody, Transcript of November 13, 1986, p. 15.]

The Petitioner mother vigorously objected to the foregoing Federal Due Process violations at all levels of the Oklahoma appellate judiciary, which, however, rejected her said contentions. Appendices C (App., pp. 14-15, paragraphs 5-6), D, and E.

B. The Substantive Due Process Issue

The second broad issue presented by this Petition – that of the violation of Due Process by reason of the vagueness and overbreadth of the "best interests of the child" test – arose not at trial, but on appeal, by the Court of Appeals' surprise adoption of that standard for affirmance. To make a long story short, the "best interests of the child" is *not* the Oklahoma standard for modification (as opposed to initial award) of child custody,[10] but, somehow, the "best interests" test nevertheless was viewed by the Court of Appeals as controlling the affirmance herein:

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[10] See *Gibbons v. Gibbons* (Okla., 1968) 442 P.2d 482, and *Boatsman v. Boatsman* (Okla., 1985) 697 P.2d 516.

> In her first proposition of error, Appellant asserts the insufficiency of Appellee's proof of the requisite elements for a change of custody. See, *Gibbons v. Gibbons*, 442 P.2d 482, 485 (Okl. 1968). However, one who challenges the Trial Court's determination of custody must put forth evidence presented below upon which he relies to establish the Trial Court's error, and must affirmatively demonstrate how such evidence shows the Trial Court's decision to have been contrary to the children's best interests. *Gorham v. Gorham*, 692 P.2d 1375, 1378 (Okla. 1984). Ultimately, the Trial Court's determination of best interests of children will not be disturbed absent a showing of abuse of discretion. *Gorham v. Gorham*, 692 P.2d 1375, 1378. We have reviewed the record and briefs, and find that Appellant has failed to demonstrate how the Trial Court's adjudication of custody is contrary to the child's best interests.

Appendix C, paragraph 4, App., pp. 13-14. Therefore, whether rightly or wrongly from the standpoint of Oklahoma law, this case *was* affirmed on the basis of the generalized and subjective initial-award "best interests of the child" test; and since this issue was not interjected into these proceedings until the promulgation of the Court of Appeals' affirmance herein, there was nothing short of this Petition to the United States Supreme Court that the Petitioner mother could do about the "best interests" test's first appearance herein at the appellate level.[11]

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[11] Under Oklahoma practice, a civil appellant appeals not to an intermediate Court of Appeals, but directly to the State Supreme Court. If the Supreme Court deems the appeal to be of less than primary importance, the Supreme Court then "downloads" the appeal, with the record and the briefs, to one of Oklahoma's four Courts of Appeals. If a litigant feels aggrieved by a decision of the Court of Appeals, he may then

(Continued on following page)

REASONS FOR GRANTING THE WRIT

Part A: The *In Camera* Interview Issues

By conducting what turned out to be the critical evidentiary stage of the trial in secret, the trial court denied the Petitioner mother a number of interrelated and overlapping albeit conceptually distinct procedural Due Process rights. These rights include: the right to an open and public trial; the right of confrontation and cross-examination of the adverse witness; and the right of rebutting that witness's testimony by independent evidence.

With this delineation of what Due Process rights were denied, let us now move on to a consideration of the relevant criteria for review from Supreme Court Rule 17.

1. A State court . . . has decided a Federal question in a way in conflict with applicable decisions of this Court.

Rather than belabor the obvious, let Petitioner satisfy the foregoing criterion with the following tabulation:

(Continued from previous page)

petition the Oklahoma Supreme Court for discretionary review by certiorari. However, that petition for certiorari back to Supreme Court may not argue the merits. Oklahoma Appellate Rules 3.13-3.14, 12 O.S., Ch. 15, App. 3. Moreover, even if and when review is granted by the State Supreme Court, the litigants are normally still bound by their briefs as originally submitted to the Supreme Court before that Court's "downloading" of the appeal to a Court of Appeals. Oklahoma Appellate Rule 3.15. Thus, by this quirk of Oklahoma appellate practice, there is really no way that a litigant can directly attack a novelty injected into the case by a Court of Appeals – short, perhaps, of petitioning the United States Supreme Court for review.

a. Open and Public Trial

Press-Enterprise Co. v. Superior Court (1984) 464 U.S. 501, 509-513; *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 13-15; *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555; *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 606-607.

b. Confrontation and Cross-Examination

Coy v. Iowa (1988) ___ U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798; *Goldberg v. Kelly* (1970) 397 U.S. 254, 269; *Greene v. McElroy* (1959) 360 U.S. 474, 496; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1937) 301 U.S. 292, 300-303.

c. Rebuttal

I.C.C. v. Louisville & Nashville RR Co. (1913) 226 U.S. 88, 93-94; *Carter v. Kubler* (1943) 320 U.S. 243, 246-247.

Given the foregoing precedents, the very proposition of a trial court's allowing a critical witness to testify in secret, and thereafter sealing the transcript so that even counsel doesn't know what it is that his client must rebut, would seem so fundamental and self-evident a denial of Due Process as to evoke a universal and unanimous condemnation of the practice. But that, astoundingly, is not the case. So, that brings us to consideration of the next Rule 17 criterion:

2. A State court of last resort has decided a Federal question in a way in conflict with the decisions of other State courts of last resort.

a. The Confrontation/Cross-Examination and the Open Trial

The applicability and satisfaction of this criterion for review is amply demonstrated by the Petitioner mother's citation to the Honorable Supreme Court of the Annotation, "Propriety of Court Conducting Private Interview

with Child in Determining Custody," 99 A.L.R.2d 954 (1965), which collects the various State rulings on the precise question at bar, namely, the constitutionality *vel non* of the *in camera* interview practice, at least as applied to child custody contests. Astoundingly, this Annotation tabulates a sharp, divisive and embarrassing conflict in the State reports on these precise Federal Due Process questions, questions which therefore literally cry out for resolution by the United States Supreme Court.

Petitioner's own research discloses that the following State decisions have voided *in camera* interviews as unconstitutional, and which cases the Oklahoma decision at bar therefore conflicts with: *Gennarini v. Gennarini* (1984) 2 Conn.App. 132, 477 A.2d 674, *Holt v. Chenault* (Ky., 1987) 722 S.W.2d 897, *Ex Parte Berryhill* (Ala., 1982) 410 So.2d 416, 418, *Ex Parte Wilson* (Ala., 1984) 450 So.2d 104, *Raper v. Berrier* (1957) 246 N.C. 193, 97 S.E.2d 782, 783-784, *In re Gibbons* (1956) 245 N.C. 24, 95 S.E.2d 85, *Cook v. Cook* (1969) 5 N.C.App. 652, 169 S.E.2d 29, *Tschappat v. Kluver* (Iowa, 1971) 193 N.W.2d 79, 80, *Duncan v. Duncan* (Mo.App., 1975) 528 S.W.2d 806, 808-809, *Jenkins v. Jenkins* (1954) 125 Cal.App.2d 109, 269 P.2d 908, 910, *Baker v. Vidal* (Tex.Civ.App., 1962) 363 S.W.2d 158, 159, and *Rea v. Rea* (1952) 195 Ore. 252, 245 P.2d 884, 885-887, see also *Muraskin v. Muraskin* (N.D., 1983) 336 N.W.2d 332, 335 (fn. 2), *Commonwealth ex rel. Morales v. Morales* (1972) 222 Pa.Super. 373, 294 A.2d 782, 783, *Gerald G. v. Theresa G.* (1981) 284 Pa.Super. 498, 426 A.2d 157, 161, and *Willingham v. Willingham* (1941) 192 Ga. 405, 15 S.E.2d 514, 516-517.

Of these, Petitioner submits the following as the better-reasoned: *Gennarini v. Gennarini* (1984) 2 Conn.App. 132, 477 A.2d 674, *Holt v. Chenault* (Ky., 1987) 722 S.W.2d 897, *Ex Parte Berryhill* (Ala., 1982) 410 So.2d 416, 418, *In re Gibbons* (1956) 245 N.C. 24, 95 S.E.2d 85, *Commonwealth ex rel. Morales v. Morales* (1972) 222 Pa.Super. 373, 294 A.2d

782, 783, and see also footnote 2 to *Muraskin v. Muraskin* (N.D., 1983) 336 N.W.2d 332, 335. And of the cases holding the contrary, Petitioner likewise offers the following as best stating the opposite rule: *Oakes v. Oakes* (1964) 45 Ill.App.2d 387, 195 N.E.2d 840, 99 A.L.R.2d 949,[12] *Callen v. Gill* (1951) 7 N.J. 312, 81 A.2d 495,[13] *Lincoln v. Lincoln* (1969) 24 N.Y.2d 270, 247 N.E.2d 659, *Marshall v. Stephanides* (1973) 17 Md.App. 364, 302 A.2d 682, and *Lesauskis v. Lesauskis* (1982) 111 Mich.App. 811, 314 N.W.2d 767.

Essentially, this conflict over the applicability of Due Process of Law *vel non* to custody contests can be said to lie between the "constitutionalist" decisions (couched in predictable Due Process phraseology) and what we might call the "sociological" pronouncements ("modern psychiatry," *Oakes v. Oakes* (1964) 45 Ill.App.2d 387, 195 N.E.2d 840, 844), "child psychology," *Lincoln v. Lincoln* (1969) 24 N.Y.2d 270, 247 N.E.2d 659, 660, or the "ill at ease" child, *Colvert v. Colvert*, at bar).

Since we are merely at the "petitioning" stage in this matter, presenting the two extremes on this Due Process issue may be proper:

> The principal issue in this appeal concerns the propriety of the trial court's interview in chambers with the seven year old child of the parties, in the absence of the parties and their counsel and over the objection of the defendant. * * *

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[12] *Oakes v. Oakes* was therefore the "lead" case for the Annotation at 99 A.L.R.2d 954. However, *Oakes* is no longer the law in Illinois, *DeYoung v. DeYoung* (1978) 62 Ill.App.3d 837, 379 N.E.2d 396, 398-399 – if indeed *Oakes* ever truly was the law in Illinois, see *People ex rel. Bernat v. Bicek* (1950) 405 Ill. 510, 91 N.E.2d 588, 595-597.

[13] New Jersey now allows parents to observe their children's *in camera* testimony through closed-circuit television. *In re S. S.* (1982) 185 N.J.Super. 3, 447 A.2d 183.

We find ourselves in accord with those courts which have prohibited such a practice. We conclude that in the absence of the consent of the parties to such a procedure it is a violation of due process of law for the trial court to interview a minor child in the absence of the parties and their counsel. * * *

. . . [S]uch a practice carves out the only place in our jurisprudential landscape in which, without the parties' consent, the fact-finder deciding the ultimate merits of a controversy is permitted to consider evidence which is presented to it in the absence of the parties or their counsel. Ordinarily, so-called "secret evidence" has long been thought to be constitutionally invalid. * * *

Surely such a legally extraordinary and unique procedure as a private interview between child and factfinder, involving as it does a radical departure from "the usual and ordinary procedures of a proper and orderly hearing" on such an "inherently fact-bound" determination . . . must carry with it compelling reasons of necessity and value to the fact-finding process in order to command constitutional approval. Our examination of the reasons and values posited in favor of such a procedure does not persuade us that they justify such a departure.

The principal justifications advanced for the practice are the necessity of ascertaining the child's preferences and feelings to the trial court's very sensitive determination of custody or visitation, and the need to obtain that information in a way which will maximize the child's freedom of expression and avoid the trauma of requiring an expression of those preferences and feelings in the ordinary adversarial setting or in the presence of the parents about whom the child is expressing them . . . These justifications, however, rest on several assumptions which we believe to be of sufficient doubt so as not to justify the practice; and they ignore other factors

> which we believe to be of sufficient weight to require its invalidity.

Gennarini v. Gennarini (1984) 2 Conn.App. 132, 477 A.2d 674, at 474-476. By contrast, the "sociological" approach to the dilution of Due Process felt to be justified because of the involvement of children is no less predictable:

> As a general rule, this Court has repeatedly suggested that a child of tender years express his preference during a private conference with the judge . . . The child, who has already experienced the emotional trauma of his parents' separation, should be relieved from the additional distress resulting from cross-examination and testifying before the parents . . .
>
> Plaintiff argues that **some nebulous legal right** is violated where the trial court conducts the conference without the presence of the parties or counsel. **Plaintiff cites no authority in support of this contention** . . .
>
> Furthermore, **plaintiff has failed to supply this Court with one good reason for requiring the presence of counsel at the meeting.** The scope of the conference is limited to determining the child's preference *only* and does not include discussion of other factors germane to the custody dispute . . . Consequently, **the utility of the presence of counsel is slight** . . .
>
> Similarly, we hold that **the best interest of the child outweighs any diminution of the parental right to appeal** that may result from failure to record the conversation.

Lesauskis v. Lesauskis (1982) 111 Mich.App. 811, 314 N.W.2d 767, 768-769 (boldface emphasis supplied, italics in original).

Clearly, this embarrassing spectacle of irreconcilable conflict among the State higher courts on a frequently-raised question of Federal constitutional law calls out for the United States Supreme Court's long-overdue resolution thereof.

b. The Separate Problem of Rebuttal

Let the Petitioner mother but briefly explain her distinction between the right to an open and public trial, and to confrontation and cross-examination, on the one hand, and the supplemental but somewhat distinct right to rebut or explain adverse testimony, on the other. Let the Petitioner mother illustrate this distinction with the judicial procedure in increasing vogue in child-abuse cases, of "shielding" the minor victim of child abuse from direct, same-room, eye-to-eye confrontation with his or her abuser, or of allowing the child's report of abuse to be established by the testimony of the examining physician, social worker, or some such.

Conceding, however, the constitutionality of such "shields" (as this Petitioner mother of two small children personally tends to), the fact remains that even in jurisdictions erecting such "shields," the accused still ***knows*** what the child said or is saying. In **NO** jurisdiction in America does a child-abuse "shield" go so far as to withhold the child's direct or indirect testimony from scrutiny by the accused. Thus, whether the accused only hears the child testifying from behind a screen, or over a close-circuit television loudspeaker, the accused still hears every word the child says; and even if the child is shielded from the courthouse altogether, and "testifies" through an adult in such a way that the accused can't actually cross-examine the child, nevertheless, the accused still **hears** what it is that the child supposedly said.

In other words, "shielded" testimony is **not** the same thing as **SECRET** testimony (meaning testimony ***kept*** secret!) – for "shielded" testimony at least allows the affected litigant some right of rebuttal, whereas secret testimony, by its very nature, clearly does not.

Mindful of this distinction between "shielded" and truly *secret* testimony, even the "sociological" cases cited

above, while upholding the constitutionality of allowing children to testify privately, have nevertheless "hedged" their uneasiness over the Due Process problems involved by also ruling that whenever a child in a custody case does testify *in camera*, the parent-litigants must then be advised of their child's testimony. Thus, in Maryland the transcript of the child's testimony must be read in full to the parents before they can be required to rest, *Marshall v. Stephanides* (1973) 17 Md.App. 364, 302 A.2d 682, 685, while the other *"in camera"* States view Due Process as requiring that at least the substance of the children's testimony be divulged to the parent-litigants, *Rose v. Rose* (W.Va., 1986) 340 S.E.2d 176, 179, *Callen v. Gill* (1951) 7 N.J. 312, 81 A.2d 495, 498-499, *Oakes v. Oakes* (1964) 45 Ill.App.2d 387, 195 N.E.2d 840, 844, *Lincoln v. Lincoln* (1969) 24 N.Y.2d 270, 247 N.E.2d 659, 661, and see also *Muraskin v. Muraskin* (N.D., 1983) 336 N.W.2d 332, 335 (fn. 2).

In other words, but for this instant Oklahoma decision, there is NO Anglo-American decision *anywhere*, civil or criminal, upholding, as against a Due Process challenge, a trial court's depriving a parent of custody in the face of the court's BOTH excluding parents *and counsel* from the *in camera* interview AND denying the parent-litigants even so much as a summary of their child's testimony! Nor is the case of *Lesauskis v. Lesauskis*, supra, 111 Mich.App. 811, 314 N.W.2d 767, to the contrary. That case specified, in the portion quoted above at p. 16, that the *in camera* interview is applicable only with children "of tender years," and only then to express their naked preference, not to testify to disputed or disputable facts – as expressly clarified in the subsequent Michigan decision of *In re Crowder* (1985) 143 Mich.App. 666, 373 N.W.2d 180, 181-182.

Yet, that forbidden elicitation of disputable "facts" in secret – and later *kept* secret by the trial court! – is

precisely what happened at trial in this case, as expressly affirmed by the appellate courts of Oklahoma. Therefore, this instant case presents the ***extreme*** "dilution" of Due Process which the *in camera* interview process is capable of wreaking, and for that reason this Petition presents a most appropriate vehicle for testing just how far procedural Due Process may be sacrificed on the altar of the so-called "best interests of the child."

c. The Decisive Issues Narrowed

The problem with the *in camera* interview's constitutionality *vel non* appears to arise not from the fact that that procedure is resorted to primarily in custody disputes, for even under Oklahoma law, a divorce judge's reception of an *adult's* secret testimony *in camera* is *per se* unconstitutional and reversible. *Malone v. Malone* (Okla., 1979) 591 P.2d 296, *Steph v. Steph*, Okla.App., 1989, unreported, Appendix F.[14] Rather, the problem appears to arise from the fact that it is a *child* who is the witness – and the justification for invoking a non-Due Process procedure, when stated, is typically no more than a vague reference to "modern psychiatry" (*Oakes v. Oakes*, supra, 195 N.E.2d at 844), "child psychology" (*Lincoln v. Lincoln*, supra, 247 N.E.2d at 660), or some such (e.g., Due Process could make a child "ill at ease"). Yet, these vague allusions to "child psychology" as somehow "superseding"

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[14] This *Steph v. Steph*, Okla.App., Div. I, No. 71166, October 10, 1989 (unreported), has recently held 12 O.S.A. 2614(A), which is essentially identical to Federal Rule of Evidence No. 614, to guarantee the right of cross-examination, *even in a child-custody dispute*, of *any* witness listened to by the trial judge. A copy of the relevant pp. 3-5 of the slip opinion in *Steph* is reproduced at Appendix F hereto. The Advisory Committee's Note to Federal Rule of Evidence 614 also emphasizes that, "The right to cross-examine, with all it implies, is assured."

Due Process have not gone unchallenged elsewhere in the lower courts:

> These [sociological] justifications, however, rest on several assumptions which we believe to be of sufficient doubt so as not to justify the practice [of *in camera* interviews].

Gennarini v. Gennarini, supra, 2 Conn.App. 132, 477 A.2d 674, at 676 (1984). Accord:

> In our research of the professional literature on the matter, we have not discovered any study, based on empirical data, which deals with the damaging psychological effect of giving testimony in the presence of the jury and the accused, on the sexually abused child. Rather, we found that such literature merely contains generalized statements to this effect.

Hochheiser v. Superior Court (1984) 161 Cal.App.3d 777, 208 Cal.Rptr. 273, 283.

So, the question at bar boils down to: does the supposed science of psychology *per se* justify suspending or altering the established procedural safeguards of Due Process of Law merely because it is a child who is called as a witness? Or, on the other hand, are the Due Process requirements of open judicial proceedings and of confrontation/cross-examination of adverse witnesses so much an integral part of the "integrity of the fact-finding process" as to inflexibly forbid any tampering therewith even to accommodate an occasional under-age witness? As seen from the custody-contest decisions cited above, rarely is any middle ground even mentioned.

Therefore, this Petitioner would invite the Supreme Court to take the opportunity presented by this case to consider engrafting a middle ground upon the custody contest situation, by transplanting thereto the more flexible approach of this Honorable Court's criminal-law decisions of *Coy v. Iowa* (1988) ___ U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798, *Press-Enterprise Co. v. Superior Court*

(1984) 464 U.S. 501, 509-513, and *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 13-15, namely, that Due Process is *presumed* to be violated by any deviation from traditional confrontation/cross-examination, rebuttal, and open-court procedures, but that that presumption may be overcome by the trial court's making *individualized* findings, based on competent, *on-the-record* evidence, that *particular* emotional harm or psychic trauma would result to a *particular* witness if forced, under the circumstances of the case and the witness's expected testimony and cross-examination, to undergo conventional open-court confrontational procedures.

This proposed presumption favoring conventional Due Process procedures in the absence of an individualized finding of emotional harm based on competent evidence would undoubtedly require at least a remand in this case: The child involved herein was 13 at the time of trial,[15] was a very good student and was in excellent mental, emotional and physical health. Moreover, the Petitioner mother was not exactly on trial for "abusing" Jay. Even the so-called "embarrassment" factor was absent or muted in this case, as this boy had already expressed to both his parents a preference for a "change of scenery." Under these facts, then, the Honorable District Judge's naked *assumption* that the child might feel "ill at ease" as a justification for dispensing with Due Process was clearly insufficient to rebut the presumption of *Coy v. Iowa* and the *Press-Enterprise* cases.

This proposed "importation" of the criminal-law *Coy v. Iowa* raises another important question which should

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[15] The same age, incidentally, as of the prosecutrix in *Coy v. Iowa*, supra. Similarly worthy of some mention is the fact that Oklahoma's statutory child-witness "shield" laws specify twelve years and below as the age for invoking those "shields." 12 O.S.A. 2803.1, and 10 O.S.A. 1147-1148.

be addressed by the Supreme Court, namely, To what extent are the criminal-law guarantees of the Bill of Rights, or at least the essential substance thereof, also applicable to civil litigation because of the Fourteenth Amendment's Due Process Clause? Actually, the Petitioner has already cited a number of civil U.S. Supreme Court cases in support of her confrontation/cross-examination and her rebuttal contentions under Criterion 1, supra, so that leaves for further discussion herein essentially the open and public trial issue. Regarding this issue too, the U.S. Supreme Court "newspaper" cases cited under Criterion 1 are also civil cases, although they arose from the criminal context and the actual holdings therein only go so far as to say that the Sixth Amendment guarantees open and public trials in criminal prosecutions. Nevertheless, as noted by Chief Justice Burger in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555:

> Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

Id., 448 U.S. at 580, footnote 7, and noting an abundance of historical authority. Therefore, this Petition does present the Court with the opportunity to confirm Chief Justice Burger's sentiments in *Richmond Newspapers*, supra.

And that brings us to another aspect of this civil-criminal dichotomy presenting itself for clarification herein, namely, the question of prejudice. In this case, the Oklahoma appellate courts employed what might be called the "other evidence" concept of "harmless error" to confirm its affirmance herein:

> Even admitting arguendo the error of the Trial Court in this respect, we find ample evidence in [the] record apart from the *in camera* testimony supporting findings of substantial change of condition, and that the child's best interests

> would be better served by awarding custody to Appellee.

Appendix C, paragraph 7, App., p. 17. This foregoing "other evidence" test for "harmlessness" is, of course, the absolute contrary to the standard laid down in *Fahy v. Connecticut* (1963) 375 U.S. 85,[16] reaffirmed in *Chapman v. California* (1967) 386 U.S. 18, 23-24; and *Chapman's* presumption of prejudice was adopted as proper in the recent *Coy v. Iowa* (1988) ___ U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798. However, the only diminution of the right of confrontation suffered by that defendant was merely that of *looking* at the 13-year-old prosecutrix, who otherwise testified and was cross-examined in open court. In *this* case, the denial of confrontation and of open proceedings resulted in the adverse testimony's total secrecy and the quashing of any conceivable right to rebut same. In this latter circumstance, and even in a child custody dispute, the resulting prejudice, according to some authority, appears to be that of prejudice *per se*, as opposed to merely presumptive prejudice: *Holt v. Chenault* (Ky., 1987) 722 S.W.2d 897, 899, and, ironically, *Malone v. Malone* (Okla., 1979) 591 P.2d 296, 299, and *Steph v. Steph*, Okla.App., 1989, Appendix G hereto, App. p. 23.

Thus, this case presents the Supreme Court with two additional options – prejudice *per se*, and presumptive prejudice – above and beyond the "other evidence" test. This question too calls for resolution by the Supreme Court.

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[16] "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a *reasonable possibility* that the evidence complained of ***might have contributed*** to the conviction." 386 U.S., at 86-87 (emphasis added).

3. A State court . . . has decided an important question of Federal law which has not been, but should be settled by this Court . . .

Legal questions which affect a large number of citizens may properly claim some priority on the Supreme Court's attentions. This case clearly falls within that category. Consider: most Americans eventually marry, and of those who do, most will eventually have children. But, sadly, the divorce rate in the United States is beginning to approach fifty per cent of all marriages. That means a lot of divorces, and a lot of those divorces, either in the original actions, or later on modification motions, involve disputes of child custody. While this Petitioner can cite no precise statistics to the Court, it is nevertheless abundantly obvious that, next after traffic, small claims and the like, most Americans who ever have to go to court do so in domestic relations matters – which are most often litigated when there are minor children involved. Clearly, that means a lot of cases much like the present one, and surely the cases cited in the Annotation at 99 A.L.R.2d 956, discussed earlier, involving precisely the Due Process issues presented herein, are but the tip of the iceberg.

Moreover, the substantive right involved in domestic litigation is among the most fundamental: the custody and care of one's own minor children. *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 et seq; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535; *Stanley v. Illinois* (1972) 405 U.S. 645, 651; *Santosky v. Kramer* (1982) 455 U.S. 745, 753. And, while this Petition does not, strictly speaking, present a "women's rights" case, the Petitioner mother would still urge the Court's reflection on what rights than the right to her own children (and the related right to a scrupulously fair legal procedure when that fundamental right is attacked) could possibly be of more fundamental importance to a divorced or separated woman?

Nor is the related procedural right urged herein some mere technicality: the right of confrontation and cross-examination has long been recognized as "the greatest legal engine ever invented for the discovery of truth," *California v. Green* (1970) 399 U.S. 149, 158, quoting Wigmore. Indeed, this Honorable Court's decisions which made the Sixth Amendment's Confrontation Clause binding on the States by virtue of the Due Process Clause of the Fourteenth Amendment, namely, *Pointer v. Texas* (1965) 380 U.S. 400, and *Barber v. Page* (1968) 390 U.S. 719, were later held retroactive precisely because the denial of those rights totally vitiated the very "integrity of the fact-finding process." *Roberts v. Russell* (1968) 392 U.S. 293, 294, and *Berger v. California* (1969) 393 U.S. 314, 315.

Thus, the right to Due Process of Law in a child custody dispute is, certainly for women, extremely important, both in respect to the fundamental nature of the substantive rights involved, to the critical importance of the procedural rights of confrontation and of rebuttal to the fact-finding process, and also in the sense of the sheer number of such cases always going on Nation-wide – a concern compounded by the large number of States (according to the Annotation at 99 A.L.R.2d 956, supra) which apparently have "balanced" procedural Due Process right out of the scales of domestic justice.

The issues presented by this Petition also enjoy a prominent degree of timeliness as well. It was only in 1988 that the Supreme Court rendered its first decision on the Due Process aspects of children as protectable witnesses, *Coy v. Iowa* (1988) ___ U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798; and the Federal Due Process aspects of children's testifying is still very much in a state of uncertain development and flux, as evidenced by the Supreme Court's recent grants of certiorari, on January 16, 1990, in *Maryland v. Craig* and in *Idaho v. Wright*, October Term, 1989, Nos. 89-478 and 89-260, to review, respectively,

Craig v. State (1989) 316 Md. 551, 560 A.2d 1120, and *State v. Wright* (1989) 116 Idaho 382, 775 P.2d 1124. As is readily evident from these two State decisions, there continues to be considerable difference of opinion as to what Due Process, under *Coy v. Iowa*, actually requires when a child testifies; and while *Coy*, *Craig* and *Wright* are all criminal cases, there is no lesser need for similar Supreme Court clarification of the corresponding Due Process requirements in civil cases as well. **Indeed, this instant Petition presents a very logical and much needed "companion case" to *Craig* and *Wright*.**

The Petitioner mother therefore urges that the grant of certiorari in this case would be most proper and advisable for reviewing the instant Federal Due Process questions, which are long overdue for a definitive resolution.

Part B: The "Best Interests of the Child" Issues

This second major issue is, simply, whether the so-called "best interests of the child" test, at least as a test for modification if not initial award of custody, is so vague and overbroad as to violate substantive Due Process.

That question may be restated as follows: What does the "best interests of the child" test mean? The Petitioner mother submits that the answer is: nothing, or anything, or everything, according to the absolute and arbitrary whims and caprices of the trial judge, such that Oklahoma domestic practice is pretty much a "government of men" rather than a "government of laws," as condemned ever since *Marbury v. Madison* (1803) 1 Cr. 137, 163, 2 L.Ed. 60, 69.

It is long-established Federal law that vague and overbroad statutes offend Due Process. *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 et seq. This constitutional "void for vagueness" doctrine is equally applicable to the civil context as well. *Baggett v. Bullitt*

(1964) 377 U.S. 360. Significantly, some parental termination standards have been voided for vagueness. *Alsager v. District Court* (S.D.Iowa, 1975) 406 F.Supp. 10, aff'd on other grounds 545 F.2d 1137 (8th Cir., 1976); *Roe v. Conn* (M.D.Ala., 1976) 417 F.Supp. 769, *Davis v. Smith* (1979) 266 Ark. 112, 583 S.W.2d 37.

Turning to the "best interests of the child" test itself, Petitioner notices that even the Honorable U.S. Supreme Court itself has voiced considerable uneasiness over it:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

Quilloin v. Walcott (1976) 434 U.S. 246, 255, quoting from *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 862-863 (concurring opinion). That misgiving has been shared by the commentators:

> " . . . [T]he best interests of the child" may be so broad a standard as to justify virtually any discretionary decision made by a judge.

Orman Ketcham and Richard Babcock, "Statutory Standards for the Involuntary Termination of Parental Rights," 29 Rutgers Law Rev. 530, 549 (1976). And,

> . . . [T]he courts which use the more prevalent best interest test operate in a comparatively free-wheeling manner. In determining best interest courts evaluate any of a large number of factors including moral fitness . . . comparative physical environments . . . emotional ties . . . the age, sex and health of the child . . . continuity of the existing relationships . . . and the articulated preference of the child. The multiplicity and complexity of these factors, the tendency of the court to emphasize different factors in each case, and the failure to adopt procedures designed to aid this factual inquiry and thus to fulfill the

> expressed concern for the child, has led to some feeling that the test may be unworkable or a mere cloak for the operation of judicial intuition.

Comment, "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties," 73 Yale Law Jour. 151, 153-154 (1963).

These vagueness concerns were judicially reinforced in *In re J.P.* (Utah, 1982) 648 P.2d 1364, 1372-1377, which quashed Utah's "best interest" parental termination statute on other Due Process grounds, but with this *caveat* on the vagueness of the statute:

> Unlike the standard of "parental fitness," which imposes a high burden on the state in an adversary proceeding, the standard of "best interest" of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse.

In re J.P., supra, 648 P.2d at 1376.[17] Accord:

> . . . I think some contours should be given to the nebulous phrase "best interests of the child." To deprive natural parents of their child, in my opinion, requires more than someone else's idea of what is best for it, even if that someone else is a court. The test followed here, if it is a test in any sense of the word, does not gain meaning by mere repetition, nor do its words express limitations characteristic of our traditions in the role of government . . . The terms "welfare" and "best interests," however pleasing may be their sound, afford little in the way of a guide- . . . Where the issue is nothing more specific than welfare, the range of inquiry is virtually unlimited, with corresponding room for arbitrary or personal decision.

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[17] Apparently, the juvenile court in *J.P.* did void the "best interests" statute squarely for vagueness. See "Recent Developments, XII, Parent and Child," 1983 Utah L. Rev. 245, note 526, at 246.

Giacopelli v. Florence Crittenton Home (1959) 16 Ill.2d 556, 158 N.E.2d 613, 619 (concurring opinion).

These foregoing expressions, from the U.S. Supreme Court on down, are, as stated, concerns, not holdings. But concerns should not remain concerns forever. Either the concern is valid, or, upon further review, the concern is not valid. In either case, such a concern should be resolved for the settlement, stability and predictability of the Law. Since the voicers of concern over the possible invalidity of the "best interests" test include the U.S. Supreme Court itself, the Court should, in the interests of the clarity and the certainty of the Law, take this opportunity to resolve – one way or the other – its own and others' solemn concerns about the "best interests" test. This Petition clearly presents that opportunity for such resolution.

CONCLUSION

One American supreme court has condemned the *in camera* child interview as a throw-back to Star Chamber. *Ex Parte Berryhill* (Ala., 1982) 410 So.2d 416, at 418. Another American supreme court has denounced the reception of other secret testimony in a custody dispute as a reversion to the Inquisition. *People ex rel. Bernat v. Bicek* (1950) 405 Ill. 510, 91 N.E.2d 588, 595, 596-597. And in yet another case, also involving child custody although in a somewhat different context, ***the*** American Supreme Court has seen fit to describe with the term "kangaroo court" that process which, *inter alia*, denies, as here, confrontation and/or cross-examination altogether. *In re Gault* (1967) 387 U.S. 1, 28, 42-57.

The issues presented herein are clearly "cert-worthy" in terms of substantiality, wide impact, conflict in the

relevant lower courts, intensity of the violation complained of, and timeliness of co-pendency with similar cases wherein review has been granted.

WHEREFORE, premises considered, the Petitioner does move the Honorable United States Supreme Court to grant a writ of certiorari herein.

Respectfully submitted,

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Attorney for Petitioner
Member of the Bar of the
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Of Counsel:

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APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAMES ROBERT COLVERT, JR., Plaintiff,	)	
vs.	)	JFD-75-1675
CYNTHIA M. COLVERT, Defendant.	)	

JUDGMENT

OKLAHOMA COUNTY COURTHOUSE

September 17th, 1986

Oklahoma City, Oklahoma

APPEARANCES:
Honorable James B. Croy,
Special District Judge,
Presiding.

FOR THE PLAINTIFF: Mr. Edward Goldman
Attorney at Law
416 N.W. 23rd
Oklahoma City, Oklahoma
73103

FOR THE DEFENDANT: Mr. Larry Spears
Attorney at Law
501 N.W. 13th
Oklahoma City, Oklahoma
73103

Reeda L. Frampton
Certified Shorthand Reporter
Oklahoma County Courthouse
Room 313
Oklahoma City, Oklahoma

(p. 2) (Thereupon, and on the 17th day of September, 1986, the following proceedings were had in open court, with all parties and counsel present:)

THE COURT: Let the record reflect, in fact the record already reflects, but I will advise the parties that I had an interview with the child that probably, I didn't time it, probably lasted 45 minutes or an hour, I'm sure you all are more cognizant of the time than I am.

The child has expressed a desire that the transcript of that be protected and I'm going to issue an Order that I do not even know if I have the power to do, which is I'm going to protect the record of that except for appeal. If you all petition the Court, either party petitions the Court on appeal to have the record be made available for the briefing for the Appellate Court, then I will grant if for those purposes. I don't think that either party should have the – and I – my opinion is I don't think either party should have the access to that for the sake of curiosity. I don't think that would be in the best interest of the child and also when we went into the interview I told the child that is what I was going to do and I wanted him to frame his responses to my questions based on that assumption.

I went through all of the subjects that I had and all of the subjects that both, I hope, that was my intent and I reviewed everything, all the subjects that both attorneys provided me. Mr. Goldman we have filed the original of yours in the case (p. 3) and we filed the original of yours in the case, yours I understand was not written out, but is in the case for the record.

The test on a motion to modify custody is that there is a permanent, substantial, material change in the condition, that is the first part of the test. I do not agree with the Defendant here, I think there have been so many permanent, substantial and material changes of condition in this case that that was almost a foregone conclusion. Both parties have remarried, both parties have had additional children come into the family, both parties have apparently progressed financially and socially in the community. The other major change is the child has reached the age of reason, I'm not saying he was not at the age of reason before, I didn't know him before. He quite apparently was today.

Therefore, and I find that there have been numerous material, substantial changes of condition. The child's life insofar as both families impact on it has changed substantially at least since 1978 or '76 when the divorce was granted and I believe since 1983 when I understand from the child there was a hearing on visitation, it 1983 or '82, he was not certain and that kind of came out in testimony. If the Court finds there's a change, substantial and material change of condition I then go to the best interest of the child, needless to say if there's no change of condition I stop there and the motion would be denied at that point. I want to make one comment here about the (p. 4) psychologist, it seems to me what I have heard in the past couple of days from the psychologists gets down almost to just their personal – their personal considerations what a home should be like. Dr. Sternlof to me seems to be saying that – that homes should be fairly permissive, should be kind of free-wheeling places. Dr. Heath said, homes should be a controlled environment and I think

that impacted heavily on the fact that Dr. Heath thought the Defendant should maintain custody and Dr. Sternlof thought the Plaintiff should obtain custody. Dr. Heath expressed an opinion which he would not elevate to a medical certainty, or a reasonable medical certainty about the propensity of Deborah Colvert to attempt suicide. We get down to the point where you have a non-psychologist either agreeing or disagreeing with the professionals. In this case, I find both households to be fit and proper to have custody of the child.

The child is extremely fortunate to have two sets of parents that love him and are able to afford him the – the education, I told him, I'll tell you, he – regardless of how this comes out, he's going to one of the two best schools in Oklahoma. He agrees with me on that. I will tell you I discussed with Jay the concept of quality free time and he certainly agrees with that concept that he's – that his quality free time he states generally with his father, I'm looking at my notes here, if you're wondering what I'm doing. (p. 5) I want to make one other comment about Dr. Heath stating –he didn't – the unlimited telephone calls to the Plaintiff, to the father, should be curtailed and he made the statement that, you know the boy had access here to an M.D. and R.N., at the father's. He did not make any statement that the boy has access to a pharmacist and juris doctorate, at the mother's, that kind concerned me just because it seemed to show a bias on his part that I was not prepared for.

The case is very difficult it is not one where there are clear cut avenues for the Court to follow it turns rather on penumbra and nuances. I will advise both parties, as you already know, Jay expressed the clear, unequivocal

desire to live with his father, he did that from the first minute to the last minute and it was unshakeable. I went – I approached it every way I know to – to try to use what expertise I had to glean whether or not it was clearly due to the pressure, possibly due to pressure, we talked about pressure openly at some points, he thinks he is pressured by both sets of parents, but he – I believe is clear in his decision and because of that I'm going to go ahead and change custody to the father. I think this is a difficult decision for both parties, visitation will be place at the same rate with the Defendant and Mr. Gilbert and that means that Jay will be spending the majority of the summer with them. I will not take up any matters of child-support because there has been no evidence of financial ability (p. 6) no direct evidence. Also, if either party is entertaining costs or fees, I will not consider that except by proper application.

I think Jay is fortunate to have all of you and if there were a way I could have pleased everyone I would do it, there wasn't, so the motion will be sustained.

MR. GOLDMAN: And when does the transfer occur?

MR. SPEARS: Your Honor, we would like to be heard on that. We would feel that a reasonable period of time ought to take place, at least the remainder of the week until like Sunday evening.

THE COURT: What I would like to see, is I'd like to see him in Cassidy Monday and have the change take place Sunday, Sunday evening. Now, you all, while you haven't been agreeing with another, you've been able to work with each other up to now and I hope that continues. Is there anything further?

MR. GOLDMAN: The Court will leave it to Mr. Spears and I to work out this?

THE COURT: The exact time.

MR. SPEARS: Well, I'd like to leave it to the parties to work out that.

THE COURT: Well, if they can. I don't want to place the burden on them unless it's readily evident. I would say 6 o'clock Sunday, unless the parties can work out some other arrangement, it will be 6 o'clock Sunday evening. Visitation will then begin 2 weeks from this weekend, next (p. 7) weekend will be the weekend of whatever that is, the 26th and 27th will be spent in Oklahoma City. The parties change positions as of, relating to visitation as of now, which means with respect, except with respect to Christmas. Where did he spend Christmas last year?

MR. SPEARS: We split the holiday.

THE COURT: Okay. Where did he spend Christmas day? He spent Christmas day with the Defendant?

MR. SPEARS: With the Gilberts.

THE COURT: Okay. He'll spend Christmas day with the Plaintiff this year. To me that's an important time. We'll be in recess.

(End of Proceedings)

APPENDIX B

IN THE DISTRICT COURT OF OKLAHOMA COUNT
STATE OF OKLAHOMA

JAMES ROBERT COLVERT, JR., Plaintiff,	)	
vs.	)	No. JFD-75-1675
CYNTHIA M. COLVERT, (now GILBERT), Defendant.	)	

JOURNAL ENTRY OF JUDGMENT
(Filed April 9, 1987)

On September 17, 1986, captioned case comes on for trial pursuant to Plaintiff's Motion to Modify Decree of Divorce, said proceeding having commenced September 15, 1986. The Plaintiff appeared in person and with his attorney, Edward Goldman, and the Defendant appeared in person and with her attorneys, Larry M. Spears and Clerk O. Brewster.

The Court, after hearing the arguments of counsel, reviewing the Court file, listening to the testimony of the witnesses and having over the Defendant's objection, a conference with the minor child outside the presence of the parties and their counsel, finds as follows:

1. That the transcript of the proceedings between the Court and the minor child shall be protected and not transcribed unless there is an appeal from this action.

2. That there has been numerous substantial and material changes of condition which have arisen since the entry of the Decree of Divorce on February 3, 1976.

3. That the child has reached the age of reason.

4. That both households are fit and proper to have custody of the child.

5. That the minor child has expressed a clear and unequivocal desire to reside with the Plaintiff. That the custody of the minor child should be awarded to the Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's Motion to Modify Decree of Divorce shall be sustained and the Plaintiff shall be awarded the care, custody and control of the minor child, James Robert Colvert, III, age thirteen with a date of birth of December 28, 1972.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant shall have the following visitation privileges with the minor child:

(A) Weekends – Defendant to have every other weekend from Friday evening until Sunday evening. Plaintiff is to place Jay on the 7:00 o'clock bus to Tulsa on Friday evening and the Defendant is to place Jay on the 4:30 o'clock bus to Oklahoma City on Sunday evening.

(B) Major Holidays – In odd numbered years (i.e. 1987, etc.) the Defendant shall have visitation on the following holidays: EASTER: 6:00 P.M. Friday preceding Easter until 10:00 P.M. Sunday. JULY 4TH: 6:00 P.M. evening preceding July 4th until 10:00 P.M. on July 4th.

In even numbered years (i.e. 1988, etc.) the Defendant shall have visitation on the following holidays: MEMORIAL DAY: 6:00 P.M. Friday preceding Memorial

Day until 10:00 P.M. Monday. LABOR DAY: 6:00 P.M. Friday preceding Labor Day until 10:00 P.M. Monday.

The holiday visitation schedule set out above is to be observed whether or not it coincides with the regular every other week visitation schedule and is in addition thereto. However, it is intended that the holidays alternate between custodial and non-custodial parents. Therefore, on those occasions when non-custodial visitation is ordinarily scheduled on a holiday set aside to the custodial parent, the non-custodial visitation shall not take place.

(C) Thanksgiving – this holiday is to be divided where the Defendant has two days of the four day Thanksgiving holiday and Plaintiff has two days of the holiday. Commencing with 1987, the Plaintiff shall have Jay for the first two days of the Thanksgiving holiday with the Defendant having the remaining two days. In 1988 the Defendant shall have the first two days with the Plaintiff having the remaining two days and alternate in a like fashion thereafter.

(D) Christmas – School/Christmas holiday is to be divided equally and commencing in 1987 the first half of the holiday shall be with the Defendant with the last half of the holiday with the Plaintiff. In 1988 the Plaintiff will have the first half of the holiday with the Defendant having the remaining half and alternate in a like fashion thereafter.

(E) Spring Break – Spring Break is to be divided evenly with the Plaintiff having the first half of the holiday in 1987 and the last half to the Defendant. In 1988 the

Defendant shall have the first half and the Plaintiff the last half, alternating in a like fashion thereafter.

(F) Summer – Defendant shall have visitation with Jay during the summer months commencing with June 15th and ending on August 15th. During Defendant's period of visitation the Plaintiff shall be entitled to every fathers day week end and one other week end. Plaintiff to notify defendant of the date of this week end by June 1st of each year. This week end not to conflict with defendant's vacation plans. Defendant to notify Plaintiff of such plans by May 15th.

(G) Special Visitation – With respect to Father's Day and Mother's Day, if Mother's Day falls on a weekend not regularly scheduled for Defendant's visitation, Defendant shall have visitation on Mother's Day from 12:00 noon until 10:00 P.M.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff is hereby ordered to refrain from recording any conversations between the Defendant and the parties' minor child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant is to be allowed liberal telephone access with the parties' minor child and vice versa.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Court makes no order regarding child support as there was no direct evidence regarding said issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the transfer of the child

from Defendant to Plaintiff shall occur by agreement of the parties, but in any event, not later than Sunday, September 21, 1986 at 6:00 P.M. The child shall be regularly attending Casady School by Monday, September 22, 1986.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant's alternating weekend visitation shall commence October 3, 1986.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the question of costs and attorney's fees shall be considered by the Court upon proper application.

/s/ James B. Croy
JUDGE OF THE DISTRICT COURT

APPENDIX C

NOT FOR PUBLICATION

IN THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

DIVISION NO. III

JAMES ROBERT COLVERT, JR., APPELLEE,	)	
vs.	)	No. 67,525
CYNTHIA M. COLVERT, now Cynthia M. Gilbert, APPELLANT.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JAMES B. CROY, JUDGE

AFFIRMED

Clark O. Brewster,
BREWSTER, SHALLCROSS,
RIZLEY & MULLON,
Tulsa, Oklahoma — For Appellant,

Edward Goldman &
Robert M. Goldman,
Oklahoma City, Oklahoma — For Appellee.

MEMORANDUM OPINION
(Filed Jan 24, 1989)

Opinion by Robert L. Bailey, Judge:

Upon consideration of the briefs, exhibits and record in the above styled matter, the Court FINDS that:

1. Appellant seeks review of the Trial Court's order modifying custody of the parties' minor son from custody with Appellant to custody with Appellee. The parties were divorced in 1976 when son, Jay, was three (3) years old, and custody awarded to Appellant subject to support and visitation by Appellee. The parties each remarried and started new families. Appellee moved to modify the decree in 1986, seeking custody of Jay, then thirteen (13) years of age.

2. The Trial Court accepted testimony of the parties, as well as testimony of the parties' respective psychologists. Appellant's counseling psychologist, Dr. H., testified that it would be in the best interests of Jay if custody remained with Appellant. Appellee's clinical psychologist, Dr. S., testified that it would be in Jay's best interest if custody was awarded to Appellee. The Court then conducted an *in camera* examination of Jay, outside the presence of the parties and counsel. The examination was transcribed and sealed.

3. The Trial Court found the homes of both Appellant and Appellee to be suitable. However, the Court also found that there had been "many permanent, substantial and material changes of condition," particularly that "the child has reached the age of reason." The Court thus granted custody to Appellee. This appeal ensued.

4. In her first proposition of error, Appellant asserts the insufficiency of Appellee's proof of the requisite elements for a change of custody. See, *Gibbons v. Gibbons*, 442 P.2d 482, 485 (Okl. 1968). However, one who challenges the Trial Court's determination of custody must put forth

evidence presented below upon which he relies to establish the Trial Court's error, and must affirmatively demonstrate how such evidence shows the Trial Court's decision to have been contrary to the children's best interests. *Gorham v. Gorham*, 692 P. 2d 1375, 1378 (Okl. 1984). Ultimately, the Trial Court's determination of best interests of children will not be disturbed absent a showing of abuse of discretion. *Gorham v. Gorham*, 692 P.2d 1375, 1378. We have reviewed the record and briefs, and find that Appellant has failed to demonstrate how the Trial Court's adjudication of custody is contrary to the child's best interests. We cannot say the Trial Court abused its discretion in its finding of substantial change of condition, or in its determination that Jay's best interests would be better served in the custody of Appellee.

5. Appellant's second and third propositions of error assail the conduct of the *ex parte* examination of Jay, and the evidence therein adduced. During the *ex parte* questioning, Jay expressed a preference for custody by his father, Appellee, and his ability to better communicate and be understood by his step-mother, Appellee's new wife. Appellant hereunder prays that this "secret" testimony be stricken for failure to allow the parties to cross-examine, or at least to explain and/or rebut the statements. While we have found no cases in Oklahoma *specifically* approving an *ex parte* examination of children in custody matters such as this, we find at least three Oklahoma cases where a private examination of the child has been conducted by the trial court and has received at least *tacit* approval of our Supreme Court. *Ex parte Hudspeth*, 271 P.2d 371, 372 (Okl. 1954) (child examined "privately" by judge without objection on appeal);

Strachan v. Strachan, 331 P.2d 372, 374 (Okl. 1958) (remanded for required record of children's preference not recorded during *in camera ex parte* examination of children); *Stover v. Stover*, 689 P.2d 952, 953 (Okl. App. 1984) (children interviewed "by judge alone" without objection on appeal). Legislation effective immediately subsequent to the instant hearing specifically permits such *ex parte* questioning of children regarding preference for custody. See, 12 O.S. 1986 Supp. §1277.1.

6. The instant case required the Trial Court to balance the rights of the parties to protect their custodial status, while at the same time, protecting the rights of Jay and mitigating the adverse impact of the parent's custody dispute on the child. The Trial Court reasoned that it would not be in the child's best interests, nor in the interest of justice, to have several people questioning him, and that such a situation would put the child "ill at ease." By the *ex parte* examination, the Trial Court thus appropriately placed the best interests of the child paramount to the interests of the competing parties, the Court's ultimate responsibility. This rationale is obviously at the heart of the 1986 amendment to 12 O.S. 1277.1, supra. We therefore find no reversible error by the Trial Court in the conduct of an *in camera* and *ex parte* examination of the parties' son.

7. Oklahoma statues in effect at the time of hearing clearly allow the consideration by the Trial Court of a child's preference as a factor in determining proper custody of the child:

> "In any divorce action in which the court must determine custody, the child may express a preference as to which of its parents the child

> wishes to have custody. The court may determine whether the best interests of the child will be served by the expression of preference and if the court so finds when the court may consider the expression of preference in determining custody. Provided, however the court shall not be bound by that choice and may take other facts into consideration in awarding custody." 12 O.S. 1981 §1277.1.

And elsewhere:

> "The court may consider the preference of the child in awarding custody of said child if the child is of sufficient age to form an intelligent preference." 10 O.S. 1983 Supp. §21.1(B).

See also, *Ex parte Hudspeth*, 271 P.2d 371, 373; *Gowin v. Julius*, 279 P.2d 954, 955-956 (Okl. 1955). The child's desire is therefore admissible as a fact to be considered with other facts by the court in exercising its discretion and determining the best interests of the child. *Bishop v. Benear*, 132 Okl. 116, 270 P. 569, 571 (1928). Under these authorities, and from our reading of the Trial Court's pronouncements, we cannot say that the Trial Court's ruling was based *solely* on the expression of preference by the child as argued by Appellant, or that the Trial Court properly determined, taking all the evidence *in toto*, and commensurate with the above statutes, that the child's best interests would be served by the preference. 12 O.S. 1981 §1277.1, supra.

7. We therefore hold that the evidence of the child's preference for custodial parent was properly admitted in the present custody modification proceedings to determine what action was truly in the best interests of the child. We subsequently find no error of law or abuse of

discretion by the Trial Court in conducting an *ex parte* examination, in its consideration of the expressed preference for custody, or by according that desire weight in making the custody determination. Even admitting arguendo the error of the Trial Court in this respect, we find ample ample [sic] evidence in record apart from the *in camera* testimony supporting findings of substantial change of condition, and that the child's best interests would be better served by awarding custody to Appellee.

The order of the Trial Court granting Appellee's motion to modify custody is therefore AFFIRMED.

GARRETT, P.J. and REYNOLDS, J. concur.

APPENDIX D

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS
(Filed Mar 10, 1989)
DIVISION 3

March 9, 1989

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

67,525 - James Robert Colvert, Jr., Appellee v. Cynthia M. Colvert, now Cynthia M. Gilbert, Appellant.

Appellant's Petition for Rehearing is *DENIED.*

* * *

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 9th day of March, 1989.

/s/ James P. Garrett
JAMES P. GARRETT, Presiding Judge

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, November 1, 1989
(Filed Nov 1, 1989)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

67,525 James Robert Colvert, Jr. v. Cynthia M. Colvert, now Gilbert. **Certiorari denied.**
All justices concur.

* * *

/s/ Rudolph Hargrave
CHIEF JUSTICE

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, September 16, 1987

(Filed Sep 16, 1987)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

67,525 James Robert Colvert, Jr. v. Cynthia M. Colvert, now Gilbert.
Motion to unseal transcript granted.

* * *

/s/ John B. Doolin
Chief Justice

APPENDIX G

NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION I

WESLEY SADLER STEPH,	)	
Appellee,	)	Case Number 71,166
versus	)	
REBECCA JANE STEPH,	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF

OKMULGEE COUNTY, OKLAHOMA

HONORABLE ANNE MORONEY, JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Conner L. Helms,
LINN & HELMS
Oklahoma City, Oklahoma, For Appellant,

Tom J. Laub,
Okmulgee, Oklahoma, For Appellee.

MEMORANDUM OPINION
(Filed Oct 10, 1989)

Opinion by STEWARD M. HUNTER, Judge:

Appellee Wesley Sadler Steph filed suit in district court alleging that he and Appellant Rebecca Jane Steph were common-law husband and wife and prayed that he be granted a decree of divorce and custody of the parties' minor son, then two years old. In response, Appellant

filed an answer denying the allegations and cross-petitioned for a decree of divorce and custody of the child.

* * *

Appellant also contends that the trial court erred in consulting privately with Appellee's expert witness on the issue of custody of the child without affording Appellant an opportunity to cross-examine the witness.

At the show cause hearing, Appellant's former counsel requested that the parties and child see a child psychologist to determine the best interests of the child. Appellant's former counsel had no objections to the appointment of Dr. Bill Bryant as the child psychologist to meet with the parties.

At trial, Appellee moved to reopen his case in order to call Dr. Bryant as a witness. Upon Appellant's objection, the trial court stated that if it felt the expert's testimony was necessary for a proper custody determination, the court would allow the witness to testify.

After Appellant presented her case, Appellee again offered Dr. Bryant as a witness, and the trial court stated that since Appellant had strongly objected to his testimony, the trial court would consult privately with the witness in chambers. Appellant was instructed that there would be no examination of the witness in open court. Appellant then requested that another expert determine whether Dr. Bryant was properly qualified as an expert witness. This request was denied.

Title 12 O.S. 1981, §2614(A) provides "the court may, on its own motion or at the suggestion of a party, call witnesses, provided that all parties *shall* have the right of

cross-examination of those witnesses." (Emphasis added.) We agree that this statute establishes a mandatory right to cross-examine all witnesses.

The right to cross-examine witnesses is the most valuable right given by law in assisting the trier of facts in determining the truth of direct testimony. *Lee Wayne Co., Inc. v. Pruitt,* 550 P.2d 1374 (Ok. 1976). Cross examination is a safeguard to truthfulness and accuracy and may be used to discredit a witness or develop facts favorable to the cross examining party. *Flo-Bend, Inc. v. Pullam,* 570 P.2d 1165 (Okl. 1977). The trial court's discretion to control the extent of cross examination does not extend to complete exclusion of such testimony. *Frierson v. Hines,* 426 P.2d 362 (Okl. 1967). The refusal to allow cross examination upon matters tending to affect credibility is error. *Frierson v. Hines,* supra.

We find the trial court committed fundamental error in refusing Appellant the right to be present during the court's examination of the expert witness and to cross examine the witness. *Flo-Bend, Inc. v. Pullam,* supra; *Frierson v. Hines,* supra. It is clear that Appellant was prejudiced by the court's action and this case must be reversed and remanded for further hearing to allow Appellant an opportunity to hear this witness' testimony and to conduct cross examination of the witness if she so desires.

The trial court's judgment is affirmed as to the divorce granted to the parties. The case is hereby reversed and remanded to the district court for a child custody hearing consistent with the views expressed herein.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

GARRETT, P.J. and MacGUIGAN, J. concur.